Natasha's Law and Precautionary Labelling

by Neil Griffiths

Bsc (Hons).,MChemA.,CChem.,CSci.,FRSC.,FIFST.,FSOFHT

Director for Neil Griffiths Advisory Ltd

It was only right and proper that following the tragic deaths involved in the recent incidents that government, enforcement and industry should have sought to re-examine both the law/guidance and systems/procedures that they are currently using to guarantee that those who suffer from food allergies are correctly informed about the allergen status of the products on sale. In particular it is understandable that this should concentrate on those products which are prepacked for direct sale (packaged on the premises were the food is sold) which were at the core of these incidents.

Having examined in detail 'Natasha's Law' that has resulted, I am becoming increasingly concerned that the legislation may be too simplistic and as a result may not produce the benefits hoped for by allergic sufferers. It may also not recognise the significant historic work, consultation and risk assessment that has been undertaken to produce the previously unmodified National Law and FSA Guidance (Part 2) that was in place and available for non-prepacked and prepacked for direct sale foods. For those who wish to understand that position can I suggest they consult the FSA Guidance on this subject which has recently been updated in draft form at:
https://www.food.gov.uk/newsalerts/consultations/updates-food-standard-agency-technical-guidance-food-allergen-labelling.

In expressing my concerns, I draw on my 45 years' experience in advising the food industry but in particular co-authoring the previous Anaphylaxis Campaign Allergen Standard to Establish Trust in Information about Allergens in Food (supported by the FSA). This led to me to chairing the industry, enforcement, public health professional and consumer consultation on this Standard before its finalisation (now 12 years ago). Also, my involvement in the consultations that led to the Food Information Regulation 2014 No 1855 and FSA Guidance that enacted and advised on this National Law. I have been committed to the provision of accurate allergen labelling and to its ongoing improvement throughout my career and the advent the Food Information to Consumers Regulation which embodied considerable improvement in this area was much welcomed.

It is obvious to me that before suggesting and enacting change to existing law one should have first examined whether the then existing law and guidance, if properly implemented, would have correctly and with sufficient visibility, informed the consumer of the allergen status of the product or the means to obtain such information. If the answer to this question is yes than it is the law's implementation and maybe its enforcement that may have been at fault in these cases.

If the answer is no then modification to the law was necessary but it is important that any such modification should recognise the significant technical and environmental difficulties that exist in the prepacked for direct sale sector before enacting such modification. I am concerned that such recognition has not been embodied in the 'Natasha's Law' that has resulted.

The Food Information (Amendment) (England) Regulations 2019 - No. 1218 (Natasha's Law) amends the Food Information Regulation 2014. It will come into force on the 1 October 2021. These changes are supported by Wales, Scotland and Northern Ireland and, at the time of writing, these nations are working towards introducing similar requirements. These changes do not cover Non-Prepacked, Products Packaged on the premises at the request of the consumer or Products Offered for Sale by means of Distance Communication. This amending regulation requires full Ingredient listing for 'prepacked for direct sale' food products either on the packaging or attached to the packaging in accordance with the Food Information to Consumers Regulation. At the time of writing proposed amendments to the FSA Allergen Labelling Technical Guidance referred to in paragraph two of this article has been consulted on.

The problems in achieving consistent allergen labelling to the levels demanded by law has been well demonstrated in the 'Prepacked Food' sector. The difficulties in so doing are regularly demonstrated in the number of Allergy Alerts/Product Recalls issued by the FSA. These demonstrate that even the largest companies can get it wrong. Many would argue, however, that the number of these recalls must be set against the large number of food products that are produced and sold on a regular basis and that this number of non-compliances represents only a very small percentage. This is of cause is true and is a testament to the substantive technical resource that is employed by the 'prepacked' food industry to implement the systems and procedures necessary to achieve this result. This obviously also requires the food companies to be operating in premises that allow proper segregation and environmental controls to ensure any cross contamination of undeclared allergens is avoided.

In the 'prepacked for direct' sale sector it is questionable whether many will currently have available to them the essential technical resource experienced enough to enact the systems and procedures to achieve consistent legally compliant full ingredient list labelling.

It is my concerns regarding the potential of cross contamination in the prepacked for direct sale sector (and the non-prepacked) which in my view presents the greatest difficulties. The need for 'precautionary labelling' (alibi labelling, may contain and the like) is currently high and, in my judgement, likely to remain high in this sector. My reasons are given below.

The need or otherwise for precautionary allergen statements is covered both in previous and current (draft form) FSA Guidance. This makes clear that 'precautionary allergen statements should only be used following a risk assessment which demonstrates a significant (or real) risk of cross contamination and must not be used as a substitute for good hygiene and safety practices. The use of precautionary allergen labelling when there is not a real risk, could be considered to be misleading food information'.

In evaluating risk it is obviously important to give consideration to the level of cross contamination that is likely to elicit a reaction in the allergic population. Scientists have and are currently evaluating these eliciting doses and good progress is being made. See https://www.jacionline.org/article/S00916749(13)01059-2/pdf. Eliciting doses which produce reactions in 1% and 5% of the allergic population are given (ED01 and ED05) for a wide range of allergens but typically these are at the milligram level or below of allergen protein for the majority of allergens. This means that allergen levels which are likely to produce an allergic response in a significant number of the allergic population only needs to be in the low parts per million in the final

food. When one considers that a ‘part per million’ is one granule of sugar in 273 sugar cubes it is understandable why the ‘prepacked’ industry has had to go to such lengths to ensure freedom from cross contamination to avoid the necessity for precautionary labelling or to enable a free from claim. It also explains why many individuals have experienced a request not to eat nuts on a flight because of the possibility of the aircrafts air system spreading nut dust to a particular nut sensitive passenger.

It is therefore not surprising to me that a considerable number of ‘prepacked for direct sale’ and ‘nonprepacked’ food companies (both large and small) have decided, following a risk assessment, to partake in wide ranging precautionary labelling. These decisions have also obviously been taken in an environment that has adequately demonstrated the potential brand and company damage that can result in getting it wrong. It is also extremely difficult for these businesses to decide what a substantial or real risk is when the levels involved could, for some allergen sufferers be so low. Adoption of a precautionary principal approach (a legal concept) which works on the principle of ‘if in doubt take the safe approach’ is obviously relevant in these circumstances.

This has, not surprisingly, produced considerable criticism (mostly on social media) from many within the industry (both prepacked for direct sale and non-prepacked) to this level of precautionary labelling. To those within the food industry I would ask them to consider whether their own businesses have conducted a proper risk assessment and whether their cleaning, segregation and environment can stand up to the necessary rigours required to avoid precautionary labelling even at their busiest times? Does their premise even allow for or have the space for proper segregation and storage together with the necessary environmental controls to avoid dust and the like?

If, as I suspect, a high proportion of ‘prepacked for direct sale’ businesses will decide to undertake or are already undertaking precautionary labelling it begs the question whether Natasha’s law will bring about any significant improvement in allergen law. The following questions are relevant:

- For an allergen sufferer has the benefits of being told what allergens have been deliberately added to the product via an ingredient list been substantially reduced if precautionary labelling suggests that the product may be contaminated with allergens at a level they can’t ascertain?
- Does the provision of an ingredients list which indicates the absence of any deliberately added allergens have the potential to confuse allergen sufferers on the safety of the product to eat even though precautionary labelling is also given?
- Should and will an allergen sufferer just avoid the product and source a ‘prepacked’ version?
- Should an allergen sufferer further have to avoid non-prepacked products and restaurant meals, where risk assessments have demonstrated a similar need to communicate the risk of possible cross contamination?

These are difficult questions for the industry that in my judgement require an honest dialogue with the allergen sensitive consumer to avoid further tragic deaths such as those recently experienced. Such dialogue will increase awareness of the issue by allergen sufferers, but it is also likely to result in a substantial reduction in the number of products or meals they can feel safe to eat.